MOTION FILED

JUN 18 2002

(6)

No. 01-1437

In The

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L. C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONALIST MOVEMENT IN SUPPORT OF OF NEITHER APPELLANTS NOR APPELLEES

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Nationalist Movement moves pursuant to Supreme Court Rule 37.2(b) for leave to file an *amicus curiae* brief in support of neither party. Counsel for Appellants, Beatrice Branch *et al*, and for Appellee, John Robert Smith, *et al*, have withheld consent to the filing. No response has been received from requests for consent from other counsel for other parties. The Nationalist Movement is concerned about forum-shopping, which focuses upon form, rather than substance, in the Mississippi Congressional re-districting controversy, in light of Fourteenth Amendment considerations and clear-precedent that districts may not be drawn exclusively for racial gerrymandering. The Nationalist Movement is concerned lest equal-protection guarantees be abdicated by the federal courts. For this reason, The Nationalist Movement respectfully requests that its Motion for Leave to File an *Amicus Curiae* Brief be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Nationalist Movement submits this brief in support of neither the position of Beatrice Branch, *et al*, nor John Robert Smith, *et al.*[1]

The Nationalist Movement is a non-profit, pro-majority[2] membership organization, chartered by the State of Mississippi. Its principal office is at Learned, Mississippi, within the Second Congressional District, one of the districts impacted by this litigation. The Nationalist Movement has members throughout the nation, but, especially, in Mississippi's Second Congressio-

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[1] Counsel of record for The Nationalist Movement, Richard Barrett, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] The term "pro-majority," as used by The Nationalist Movement, refers to propagation of the doctrine of majority-rule and democracy, as set forth generally by Thomas Jefferson in his Inaugural Address on March 1, 1801, defined as:

> absolute acquiescence in the decision of the majority, the vital principle of republics, from which there is no appeal but to force, the vital principle and immediate parent of despotism.... and should we wander from [this principle] in moments of terror or alarm, let us hasten to retrace our steps, and to regain the road, which alone leads to peace, liberty and safety.

Orations of American Orators, Vol. 1, Rev'd. Ed., Cooperative Publishing Society, New York (1900).

nal District, where many of its members and officials work, live and seek to exercise their franchise.

Through The Nationalist Movement, members are able to organize, exchange information, speak out and seek voting opportunity. Among propositions supported by The Nationalist Movement are voting by initiative and referenda, to achieve more popular democracy, run-off primaries, to assure majority-rule, and repeal of the Voting Rights Act,[3] to prevent favoritism and privilege in derogation of the Fourteenth Amendment.

The Nationalist Movement has an interest in Congressional re-districting in Mississippi in that some of its members and officials have already evacuated the Second Congressional District, perceiving that their rights and franchise are adversely impacted by racial gerrymandering. And others, including members of the general public, are following suit. The enormous toll taken by the imposition of minority racial-gerrymandering plays out in diminished voting, apathy toward the political system and decline in civic participation.

The Nationalist Movement has been and remains an advocate of federal guarantees of fundamental and constitutional rights. It not only opposes abdication of those rights, but has actively and successfully championed such rights in the courts, in the streets and through educational undertakings.

Neither a blank-check retrenchment to "states-rights," under the flawed plan of Appellants, nor a rubber-stamping of the flawed plan of Appellees, comports with the Constitution.

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[3] Voting Rights Act of 1965, 42 ***USC*** §1973.

ARGUMENT

If the District Court's decision were affirmed, it is not necessarily *Growe v. Emison* which would be overruled, precluding the courts of most states from playing any role in Congressional re-districting, even when legislatures default, but equal-protection guarantees of the Fourteenth Amendment, pursuant to *Miller v. Johnson*, which would be abrogated, by imposing prohibited racial gerrymandering.

This Congressional re-districting case presents a unique and salient opportunity to finally uproot racial gerrymandering, which has been struck down, heretofore, in various Southern states, but which, so far, has escaped judicial scrutiny in Mississippi.

The matter comes before the Court because minority Appellant Bea Branch, of the National Association for the Advancement of Colored People, and those aligned with her, had sought approval of a plan by a minority judge, in state court, which would have installed a minority Congressman in the Second Congressional District and supposedly given a Democrat, perceived as more friendly to minorities, an advantage in the Third Congressional District. Appellee John Robert Smith, a Republican, and those aligned with him, had concurred in the installation of a minority in the Second District, but sought approval of a federal court to draw the Third District in a manner perceived as more friendly to Republicans. Richard Barrett, an elector of Mississippi who had been a candidate for Congress in the Second District, opposed both plans. He alleged that he and other voters had been substantially disadvantaged in an opportunity to influence the political process effectively and sought to redraw the Second District along traditional lines, to prevent racial gerrymandering. He moved to intervene in the District

Court, but was not allowed.[4]

With both Appellants and Appellees, as well as both the state and federal courts, acquiescing to what Appellants describe as a "majority-black" Second District, attention was drawn to arguments[5] over which court should draw the plan,

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[4] The applicant for intervention first filed an Affidavit of Bias, pursuant to 28 ***USC*** §144, seeking recusal of District Judge Henry Wingate, who had been named to a three-judge federal panel to hear the case. Wingate declined to entertain or rule upon the recusal request and no other judge was assigned to hear the proceeding, despite the mandate of the statute. The three-judge panel then, on December 12, 2001, denied the Motion to Intervene, which had included; in the alternative, a request for leave to file an *amicus curiae* brief.

[5] The Voting Rights Act, as the instant case points up, has proven to be contorted, bedeviling and, even, largely unfathomable. Arguments, by both Appellants and Appellees, over "preclearance," "evaluation," "submission," "compliance," "legislation," "waiver," "violation," "review," "enablement," "voting change," "enforcement," "supremacy clause" and "duty," *see* Jurisdictional Statements, Motion to Affirm, Conditional Motion to Affirm, Brief Opposing Motion to Affirm and Brief in Opposition to Conditional Motion to Affirm, to name a few, belie the riddle-like and hydra-headed qualities and artifaces of the Act. To paraphrase Winston Churchill, the Act is "a riddle, wrapped in a mystery, inside an enigma," with racial gerrymandering, advanced by the Act's apologists, being in open warfare against attempts to create a "more perfect Union," instead of a more fragmented society. *See, e.g. Shaw v. Hunt*, 517 U.S. 899 (1996) ("Balkanization" deplored).

> If racial considerations predominate in the redis-

insofar as the Legislature had not agreed upon its own plan. While the ultimate forum-shopping was taking place, Appellants repaired to a states-rights' approach,[6] largely from pre-

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> tricting process, the ... plan will be vigorously challenged in court. The entire redistricting process will be thrown into jeopardy when the traditional redistricting principles – compactness, contiguity, and respect for political subdivision – are not strongly considered. Of course, the critique of this principle of "impermissibility" of racial consideration is that it conflicts with the standards of the Voting Rights Act....
>
> [T]here appears to be no consistent conformity. Even the federal courts have been reluctant to present an adequate mathematical formula to guide redistricting plans.

Redistricting in North Carolina, An Overview of Emerging Judicial Decisions and Doctrines, Ngozi Caleb Kamalu, Professor of Political Science, Fayetteville State University, *North Carolina Political Review,* May-June, 2002, Fayetteville, North Carolina, http://www.ncpoliticalreview.com/0502/kamalu1.htm.

Notwithstanding, the practical and constitutional infirmities of the Act laid bare by this and other proceedings may well gravitate toward the scrapping of the Act, which expires shortly, altogether, precluding tortured interpretations and disquieting contortions of the Constitution, in such context, from being ever again pressed upon the courts. After all, the Constitution should be changed, if at all, by the amendment process, not by way of statute or fiat.

[6] Citing *Growe v. Emison*, 507 U.S. 25, 33 (1993) (postulating "significant role" of state courts).

Baker v. Carr[7] days, to bolster the state-court judge, who had been installed using "sub-districts"[8] for the sole purpose of installing minority office-holders.[9]

So, if the Court were to decide that either the state or federal court were the proper forum, without more, it would have skirted the substantive issue of Fourteenth Amendment protections, altogether. Such rubber-stamping[10] would result in reversion to racial-gerrymandering strongly condemned by the

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[7] *Baker v. Carr*, 369 U.S. 186 (1962) (federal courts largely usurping state courts on re-districting).

[8] Created for the first time for judicial districts in *Martin v. Mabus*, 700 F.Supp. 327 (S.D.Miss.1988).

[9] The largely discredited procedure had been imposed to draw "sub-districts" around where minorities lived and from which minorities could qualify to seek office, although office-holders would represent larger, non-minority areas. The rationale had been that even though elections had been "opened up" to minorities, minorities still persisted in voting for non-minorities. The procedure has only been installed in a few Southern districts, *see e.g.*, "One Man, Seven Votes," *Clarion-Ledger*, Jackson, Mississippi, June 17, 1993 (minority weighted-voting in Chilton, County, Alabama) and has been criticized as the Lannie Guinier Plan, after the failed Clinton-Administration-appointee who favored drawing districts exclusively to install minorities with less than a majority vote. *See*, "Supreme Court Signals End to Racial Gerrymandering," *Montgomery Advertiser*, Montgomery, Alabama, July, 1993, http://www.majorcox.com/columns/dist-2.htm (criticism of Guinier Plan for advocating less than majority vote to hold office).

[10] *Cf. Horton v. City of Houston*, 179 F.3d 188 (5th Cir.-1999) ("rubber-stamping" condemned).

Court, heretofore. However, the Court notably seeks to consider substance over form, *cf. Swann v. Board of Education,* 402 U.S. 1, 31 (1971) ("Substance, not semantics, must govern"). To do so, it should remand[11] to whichever court seems to have the more persuasive claim to jurisdiction, but with instructions to consider the impact of *Shaw v. Reno*, 509 U.S. 630 (1993) (equal-protection applies to racial-gerrymandering claim), *Miller v. Johnson,* 515 U.S. 900 (1995) (racial gerrymandering condemned) and equal protection, so that the proposed Second district, drawn exclusively for purposes of racial gerrymandering and, in the process, tainting the Third District and the entire body politic, cannot stand.

Under either plan, the Second district has been drawn in a prohibited manner, for prohibited reasons.[12] May a Chancellor

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[11] *See, e.g., Upham v. Seamon,* 456 U.S. 37, 44 (1982) (Texas re-districting remanded for additional fact-finding) for the procedure to remand for additional facts. *See also, Shaw v. Reno,* 509 U.S. 630 (1993) (difficulty of proof does not relieve racial gerrymander from scrutiny under the Equal Protection Clause).

The *Shaw* holding bars, on Fourteenth Amendment grounds under the Equal-Protection Clause, efforts to set up separate districts solely because of race, unless narrowly-drawn to serve some compelling governmental interest, none of which is shown in the instant case.

[12]

> And the *key* here is I'm not concerned necessarily about boundaries, *per se*, but we must also remember, let's maintain some African-American representatives in this State. This State has more African-Americans than any state in the Union [emphasis added].

in one district compile Appellants' plan for an entire state? Seemingly so, as much as a divorce granted in one court would be recognized by others. But, may such a court concoct a "tornado" district, lacking in requisite compactness,[13] in derogation of traditional[14] districting considerations, for the exclusive pur

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Bo Brown, minority Jackson, Mississippi city-councilperson, before the Joint Committee of Senators and Representatives of the State of Mississippi on Redistricting, *Official Transcript*, Hinds County Courthouse, Jackson, Mississippi, May 21, 2001, 85.

> But the fact is ... this [Second Congressional] district [was drawn] to elect an African-American candidate.

Haley Barbour, former Chairman, Republican National Committee, "Fellow-Republican" Campaign statement, May 27, 2002, Yazoo City, Mississippi, http://www.charlottereeves.-com/hierarchy.html, noted in "Republican 'Elite' Unwise," *Clarion-Ledger*, Jackson, Mississippi, June 12, 2002.

[13] See *Shaw* for "reasonable compactness" requirement.

[14] Draw the lines as they were, right across the State.

Richard Barrett, former Second-Congressional-District candidate, before the Joint Committee of Senators and Representatives of the State of Mississippi on Redistricting, *Official Transcript*, Hinds County Courthouse, Jackson, Mississippi, May 21, 2001, 110.

In 1980, Congressional districts traditionally ran East and West, across the state, similar to Supreme Court districts. "Mississippi Congressional District Map for 1980," *Official and Statistical Register 1980-1984*, Mississippi Secretary of State's Office, Jackson, Mississippi, 188 (1980). In 1990, under the

pose of shoring up the Second, minority district? It may not. Neither may Appellees fall back on their plan, which also imposes a non-compact[15] district, in the Second district, with telltale "crab-legs"[16] protruding to take in minority areas.

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presumption that a minority district was "required," the lines were re-drawn, North to South, carving out the minority district in the Mississippi Delta. The plans by both Appellants and Appellees maintain such a district and, even extend it in a more "salamander-like" path along the Mississippi River. But see, *Abrams v. Johnson*, 521 U.S. 74 (1997), condemning the substitution of racial for traditional districting considerations.

[15] A district must be compact to pass constitutional muster, *e.g. Thornburg v. Gingles,* 478 U.S. 30, 47 (1986).

[16] Districts so bizarre on their face as having no explanation other than racial gerrymandering require "strict-scrutiny," *see, e.g. Miller.*

CONCLUSION

Reversal of the District Court and remand, under adequate instructions for the drawing of Mississippi Congressional districts which comport with equal protection under the Fourteenth Amendment, should likely assure that facts will be developed adequately to draw such districts and the Constitution will be adhered to.

Whether a state court, subject to challenge for unconstitutional "sub" districts, or a federal court, susceptible to a challenge for "usurpation" of the legislature, ultimately draws the districts, remand instructions to avoid racial gerrymandering should likely be sufficient to guide either body in performing its task. Controversy over any possible "forum-shopping" will, then, also, have been laid to rest.

It may be desirable for the Court to, also, direct that voters, excluded below or otherwise, be granted leave on remand to intervene, should they have proper standing and desire to do so. And that any challenge to any judge for bias be adequately and promptly heard, according to law, fair-play and traditional notions of substantial justice.

Respectfully submitted,

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Dated: July 12, 2002